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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
the State of Minnesota	)	
	)	
Petition for Declaratory Ruling Regarding	)	CC Docket No. 98-1
the Effect of Sections 253(a), (b) and (c) of the	)	
Telecommunications Act of 1996 on an Agreement	)	
to Install Fiber Optic Wholesale Transport	)	
Capacity in State Freeway Rights-of-Way	)	

COMMENTS OF NEXTLINK COMMUNICATIONS INC.

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COMMENTS OF NEXTLINK COMMUNICATIONS INC.

NEXTLINK Communications, Inc. ("NEXTLINK"), by its attorneys, hereby submits its comments in opposition to the above-captioned petition filed by the State of Minnesota ("Minnesota").[1/] NEXTLINK is a facilities-based competitive local exchange carrier with high capacity, fiber optic networks in a growing number of markets across the United States.[2/] It has a direct interest in ensuring that public rights-of-way, specifically including rights-of-way controlled by State highway departments, remain available to competitive providers of telecommunications services on a competitively neutral and nondiscriminatory basis.

1/ In the Matter of the State of Minnesota's Petition for Declaratory Ruling Regarding the Effect of Sections 253(a), (b), and (c) of the Telecommunications Act of 1996 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way, CC Docket No. 98-1, filed December 30, 1997 ("Petition").

2/ NEXTLINK currently operates 16 facilities-based networks providing switched local and long distance services in 26 markets in eight states, including California, Illinois, Nevada, Utah, Ohio, Pennsylvania, Tennessee, and Washington. NEXTLINK anticipates that an additional 13 markets will be served by four additional networks by December 1998.

INTRODUCTION AND SUMMARY

Minnesota has requested an expedited declaratory ruling that its proposal to grant ICS/UCN LLC and Stone & Webster Engineering Corporation (the "Developer") preferential access to State freeway rights-of-way to install fiber optic facilities, subject to certain obligations to make such capacity available to all telecommunications service providers, is consistent with section 253 of the Communications Act. In fact, an examination of Minnesota's agreement with the Developer demonstrates that it will "materially inhibit[] or limit[] the ability of . . . competitor[s] or potential competitor[s] to compete in a fair and balanced legal and regulatory environment."[3/]

In exchange for a share of transmission capacity, the State seeks to establish the Developer as the predominant facilities-based provider of telecommunications capacity in freeway rights-of-way. These rights-of-way are unique, and often the most efficient (or only) means of connecting population centers or crossing rivers and other natural barriers. While the relatively few third parties that will be prepared to place their facilities in the rights-of-way concurrently with the Developer also will be granted access to those rights-of-way, carriers that enter the market in the months and years to come will be forced to utilize the Developer's facilities as resellers or forego the use of the most efficient and often essential routes for their own facilities. Moreover, the lack of appropriate enforcement mechanisms would expose new

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[3/] California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934, CCB Pol. 96-26, Memorandum Opinion and Order, FCC 97-251 at ¶ 31 (rel. July 17, 1997) ("Huntington Park").

entrants to unjust, unreasonable, and unreasonably discriminatory rates for the use of the Developer's network. Because the agreement is neither competitively neutral nor necessary to preserve public health or safety, it is not permissible under sections 253(b) or (c). For these reasons, the Commission should deny Minnesota's request for relief and hold instead that the agreement is a barrier to entry in violation of section 253.[4/]

BACKGROUND

Freeway rights-of-way like those controlled by the State of Minnesota are a keystone to the vibrant development of telecommunications networks and services. State freeways often provide the most direct route between cities and therefore provide the easiest and most efficient means of connecting telecommunications networks between cities as well. State highways often provide the sole means of crossing rivers or other natural barriers. As Minnesota explains, many other States are also considering installing privately sponsored telecommunications projects in their highway rights-of-way.[5/] Because of the importance of these rights-of-way to the development of telecommunications services and networks, the Commission should ensure that States do not restrict access in a manner that establishes monopoly control over

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[4/] The Commission has indicated that State or local actions creating barriers to entry not otherwise excused by sections 253(b) or (c) are cognizable by the Commission under section 253(d). See In the Matter of the Public Utility Commission of Texas et al. Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995, CCBPol 96-13, CCBPol 96-14, CCBPol 96-16, CCBPol 96-19, Memorandum Opinion and Order, FCC 97-346 at ¶ 42 (rel. Oct. 1, 1997) ("Texas PUC"); In the Matter of Classic Telephone Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief, CCBPol 96-10, Memorandum Opinion and Order, FCC 96-397 at ¶¶ 27, 35-42 (rel. Oct. 1, 1996).

[5/] Petition at 5.

telecommunications facilities or that otherwise imposes barriers to the competitive availability of interstate or intrastate telecommunications services.

Unfortunately, the agreement between Minnesota and the Developer would create just such barriers. Under the agreement, the State has granted the Developer exclusive access to State freeway rights-of-way for longitudinal, or parallel, installation and maintenance of fiber optic cable. In exchange, the Developer will provide the State with a share of lit and dark capacity on the network, which the State will use for its telecommunications needs.[6/] The agreement requires the Developer to install the facilities of third parties concurrently and parallel with its own fiber optic cable, and to make capacity on its own facilities available through purchase or lease.[7/] Later entrants will not be able to install their own facilities in the freeway rights-of-way, however, and there are apparently no restrictions on the rates, terms, and conditions under which the Developer would make its own capacity available to third parties.

While the benefits to the State highway department are obvious – free telecommunications transmission capacity -- the adverse effect on competition is also readily apparent. The agreement establishes the Developer as the preeminent provider of telecommunications facilities in these unique and important rights-of-way. Significantly, the chairs of key committees in the Minnesota House of Representatives have indicated they have serious concerns with the agreement and have begun an investigation into the matter.[8/]

[6/] Id. at 1.

[7/] Id. at 10.

[8/] See Letter from Rep. Phyllis Kahn, Chair, Committee on Governmental Operations, Rep. Jean Wagenius, Chair, Committee on Transportation, and Rep. Irv Anderson Chair, Committee on

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DISCUSSION

I. THE AGREEMENT VIOLATES SECTION 253(a) OF THE COMMUNICATIONS ACT

Section 253(a) of the Communications Act provides that no State or local statute, regulation, or legal requirement "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[9/] This prohibition was intended to open local telecommunications markets to competition by precluding the establishment of State or local entry barriers.[10/] The Commission has found that subsections (b) and (c) create limited exceptions to this prohibition.[11/] Section 253(b) preserves the rights of the States to impose "competitively neutral" requirements that are consistent with section 254 of the Communications Act[12/] and "necessary to preserve and advance" the objectives of universal service, public safety and welfare, service quality, and consumer rights; section 253(c) preserves State and local governments' traditional authority to manage their public rights-of-way and

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Financial Institutions and Insurance, Minnesota House of Representatives, to the FCC (Feb. 6, 1998). The Minnesota Legislature previously recognized that "it is in the state's interest that the use and regulation of public rights-of-way be carried on in a fair, efficient, competitively neutral and substantially uniform fashion." Minn. Stat. § 237.163 (1997).

9/ 47 U.S.C. § 253(a).

10/ See, e.g., 141 Cong. Rec. S8173 (daily ed. June 12, 1995) (remarks of Sen. Pressler) (section 253 "recognizes the need to open up markets, the removal of barriers to entry. In many cases [State and local legal requirements] become barriers to entry, barriers to competition.").

11/ See supra note 4.

12/ Section 254 establishes the requirements for preserving universal service.

require "fair and reasonable compensation from telecommunications providers" on a "competitively neutral and non-discriminatory basis" for use of those rights-of-way.[13/]

These exceptions are not absolute, however, and the Commission has the duty to preempt requirements that are not "necessary" or "competitively neutral."[14/] The agreement presented by Minnesota would create a significant barrier to facilities-based telecommunications competition, in violation of section 253(a), and does not fall within either of the exceptions provided by subsections (b) and (c). The Commission therefore must preempt the agreement.

A. Section 253(a) Prohibits State and Local Restrictions on Facilities-Based Competition

Minnesota argues that the agreement does not constitute a barrier to entry under section 253(a) because that section focuses on State and local government actions that impede the provision of telecommunications services, and not telecommunications infrastructure.[15/] It is axiomatic, however, that entities cannot provide telecommunications services if they do not have telecommunications infrastructure.[16/] The effect of the agreement is to relegate most entrants to the status of resellers of the Developer's capacity. This, the Commission has previously found, the State may not do.

[13/] 47 U.S.C. §§ 253(b) and (c).

[14/] "[W]hile the States have got their public welfare and public interest section to administer, [the Commission's role is to ensure] that it is done on a nondiscriminatory basis." 141 Cong. Rec. S8174 (daily ed. June 12, 1995) (remarks of Sen. Hollings).

[15/] Petition at 13-16.

[16/] See, e.g., AT&T v. Village of Arlington Heights, 156 Ill.2d 399, 620 N.E.2d 1040 (1993) (finding that excessive burdens on the construction of telecommunications infrastructure would "[cripple] communications and commerce as we know it").

> [S]ection 253(a) bars state or local requirements that restrict the means or facilities through which a party is permitted to provide service, i.e., new entrants should be able to choose whether to resell incumbent LEC services, obtain incumbent LEC unbundled network elements, utilize their own facilities, or employ any combination of these three options.[17/]

B. The Agreement Materially Inhibits or Limits the Ability of Competitors to Compete in a Fair and Balanced Legal and Regulatory Environment

Minnesota argues that even if the protection provided by section 253(a) extends to telecommunications infrastructure, the agreement does not violate section 253(a) because the availability of fiber optic capacity and alternative rights-of-way in the State is so great that the agreement does not have the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications service.[18/] This argument too must fail.

To determine whether a State or local action has the effect of prohibiting an entity's ability to provide service under section 253(a), the Commission will consider "whether the requirement in question materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[19/] The Commission is not limited to considering only the effect of the exclusive rights-of-way agreement on competition between the Developer and other providers of telecommunications services, but may also consider the overall effect upon competition among the other providers. Under both analyses, the agreement fails to pass muster under section 253(a).

[17/] Texas PUC at ¶ 74.

[18/] Petition at 4, 18.

[19/] Huntington Park at ¶ 31. See also In the Matter of Petition of Pittencrieff Communications, Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995, File No. WTB/POL 96-2, Memorandum Opinion and Order, FCC 97-343 at ¶ 32 (rel. Oct. 2, 1997)
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First, although the Developer will not offer telecommunications services directly to the public, it may offer such services through affiliates.[20/] As a provider of capacity to third parties, therefore, the Developer will have an incentive to engage in anticompetitive pricing and other practices intended to provide unfair advantages to its telecommunications affiliates. While Minnesota will require the Developer to charge "uniform and nondiscriminatory" rates to all "similarly situated" customers, including its affiliates,[21/] these terms are undefined and the agreement lacks any effective mechanism for oversight or enforcement of the Developer's rate levels and other practices. Enforcement authority would apparently be vested in the Minnesota Department of Transportation, which lacks any expertise on complex rate regulation issues, rather than the Minnesota Department of Public Services.[22/] There is, moreover, no requirement that the Developer provide capacity on just and reasonable rates, terms, and conditions. For example, the Developer could design its terms and conditions to suit its affiliates' needs and then decide that volume of traffic carried or capacity used by its affiliates renders those affiliates not similarly situated with their competitors.

Second, even if certain third-party providers are able to install their fiber optic cable in the State freeway rights-of-way, many others will be denied that opportunity. This latter group will be able to compete only as resellers, while the former will have the greater control over costs

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("Pittencrieff").

20/ Petition at 11, n. 11.

21/ Id. at 31.

22/ Id. at Exhibit 5, § 7.7.

and the ability to add features and functionalities that are the hallmarks of facilities-based competition. The reseller group will be materially inhibited and limited as against the first group.[23/] Because the agreement grants the Developer exclusive access for ten years, with the right to negotiate for an additional ten years, the group of later entrants is likely to be substantial in size.[24/] The agreement effectively prohibits these later entrants' ability to provide facilities-based telecommunications services in Minnesota, in violation of section 253(a).

Third, even as to the limited class of facilities-based competitors permitted under the agreement, the Developer has exclusive right to access the freeway rights-of-way for maintenance and upgrades.[25/] The Commission previously has recognized the harm that entities with monopoly control of facilities can cause to their competitors by delaying installation of equipment or providing poor maintenance.[26/] The Developer here would have the same anticompetitive incentives that the Commission feared in those cases.

[23/] The Commission has previously recognized that late entry into a market may have an anticompetitive effect on an entity's ability to provide service. See, e.g., In the Matter of an Inquiry Into the Use of the Bands 825-890 MHz for Cellular Communications Systems, 89 FCC 2d 58,72-75 (1982) (explaining that certain conditions were imposed on the grant of wireline cellular licenses to obviate any advantages that might arise from early entry and to equalize competition). Courts, meanwhile, have recognized that denying a carrier access to a unique site that is available to its competitors may either deny the carrier the opportunity to compete with its competitors or significantly increase the carrier's costs, thereby reducing its ability to compete. See, e.g., Western PCS II Corporation v. Extraterritorial Zoning Authority of the City and County of Santa Fe, 957 F. Supp. 1230, 1237-38 (D. N.M. 1997).

[24/] Petition at 11.

[25/] Id.

[26/] See, e.g., Computer II Remand Proceeding: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards, 6 FCC Rcd 7571, 7601-05 (1991) (adopting requirements to ensure the BOCs and GTE do not discriminate in the quality, installation, and maintenance of basic services provided to non-affiliated enhanced services providers); Detariffing of Customer Premises

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II. THE AGREEMENT IS NEITHER COMPETITIVELY NEUTRAL NOR NECESSARY TO PRESERVE PUBLIC HEALTH AND SAFETY

Finally, Minnesota argues that even if the agreement violates the prohibitions of section 253(a), the grant of exclusive longitudinal access to the freeway rights-of-way falls within the exceptions provided by sections 253(b) and (c) because it represents a legitimate exercise of State authority to protect the safety of the traveling public and transportation workers and to manage its rights-of-way.[27/] In order to survive scrutiny under either section 253(b) or (c), however, the challenged action must be competitively neutral. As demonstrated above, the grant of exclusive access to the State freeway rights-of-way discriminates among providers of telecommunications services, favoring those relatively few entities that will be prepared to place their facilities in the rights-of-way concurrently with the Developer, and discriminating against those entities who enter the market in the months and years to follow, forcing them to utilize Developers' facilities or forego the use of the most efficient and often essential rights-of-way.

Moreover, even if the agreement were competitively neutral, the barriers to entry it creates must be "necessary to preserve and advance" the enumerated objectives. Even conceding that Minnesota has a legitimate right to protect its freeway rights-of-way and the safety of the traveling public, the means it has chosen are not "necessary" to achieve those ends. It is not necessary for public safety purposes or even reasonable to permit only one opportunity to place facilities in the rights-of-way and grant only one entity access to those facilities, especially in

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Equipment and Enhanced Services, 8 FCC Rcd 3891 (1993) (adopting requirements to ensure that BOCs do not discriminate against unaffiliated CPE vendors).

light of the other disruptions to freeway rights-of-way that will result from road construction and repair.

In fact, language in Minnesota's original Request for Proposals ("RFP") suggests that the real reason Minnesota decided to make access to the rights-of-way exclusive may have been to provide a commercial advantage to potential bidders and encourage higher bids.[28/] The preferential status of the Developer may also have been a quid pro quo for the transmission capacity that the Developer will furnish to the State under the agreement. As the Minnesota Telephone Authority has noted, there is no exception under section 253(b) or (c) for barriers to entry that are imposed in order to provide cost savings or a better bargaining position to the State.[29/]

CONCLUSION

The agreement between Minnesota and the Developer has the effect of prohibiting facilities-based competitors from providing telecommunications services in Minnesota in violation of section 253(a). It is not competitively neutral and does not fall within the areas of permissible State regulation under sections 253(b) and (c). The Commission should deny Minnesota's request for an expedited declaratory ruling and hold instead that the agreement

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[27/] Petition at 26-27.

[28/] See Petition at Exhibit I, page 2 (citing language in RFP offering to "barter exclusive access to freeway right-of-way" and describing the exclusive access to Minnesota's rights-of-way as "the incentive to private industry").

[29/] See Petition at Exhibit III, page 10 ("Section 253(b) does not include 'cost savings' as among the public benefits that will justify a prohibition of competition").

violates section 253.

Respectfully submitted,

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March 9, 1998

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CERTIFICATE OF SERVICE

I, Michelle Mundt, hereby certify that on this 9th day of March 1998, I caused copies of the foregoing "Comments of NEXTLINK Communications, Inc." to be sent to the following by hand delivery:

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